

ST 97-2

Tax Type: SALES TAX

Issue: Special Order v. Sale of Stock or Standard Items

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

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v.

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No.

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IBT No.

TAXPAYER,

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NTL :

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Charles E. McClellan

Taxpayer

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Administrative Law Judge

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RECOMMENDATION FOR DISPOSITION

**APPEARANCES:** Robert J. Sprague, of Sprague, Sprague and Urban, for TAXPAYER.

Synopsis:

This matter came on for hearing pursuant to the taxpayers' timely protest of Notice of Liability issued by the Department on August 20, 1991, to TAXPAYER ("taxpayer") for Retailers' Occupation Tax for the periods January 1, 1984 through December 31, 1990. An evidentiary hearing was held on June 1, 1995, in the Willard Ice Building, Springfield, Illinois. The issue is whether the taxpayer is liable for Retailers' Occupation Tax in connection with the sale of cabinetry it sold to general building contractors during the audit period. Following the submission of all evidence and a review of the record, I recommend that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department audited the books and records of the taxpayer in 1991 for the periods June 1, 1984 through December 31, 1990. (Dept. Group Ex. No. 6).

2. The Department's prima facie case, including all jurisdictional elements, was established by the admission into evidence of the Correction of Returns showing additional tax due of \$54,366. (Dept. Group Ex. No. 6).

3. Taxpayer's business began as a sole proprietorship in 1965 and was incorporated in 1984. (Tr. p. 9).

4. Prior to 1984, taxpayer's business was building and installing kitchen cabinets. (Tr. p. 9).

5. Taxpayer's business, which is called "case work," changed to commercial in 1984. (Tr. p. 9, 23).

6. Taxpayer is typically hired by a general contractor, who is hired by a project owner, to design and build cabinets, reception counters, and administrative counters. (Tr. p. 13, 18, 19, 20).

7. Taxpayer is paid by the general contractor who is paid by the owner of the project. (Tr. p. 19).

8. Taxpayer does not normally install the items it builds. (Tr. p. 20).

9. The cabinets taxpayer builds are installed by the owner or the general contractor. (Tr. p. 21).

10. Taxpayer uses architectural drawings, which provide scope of the project to design the cabinets it is hired to build. (Tr. p. 16).

11. The customer dictates the material and colors taxpayer is to use in building the cabinetry. (Tr. p. 22).

12. The cost elements of the products manufactured and sold by the taxpayer during the audit period were as follows:

Design	15.0%
Materials	36.5
Labor	35.0
Overhead	<u>13.5</u>
Total	100.0%

(Tr. p. 29).

13. During the audit period taxpayer self assessed use tax on material purchased from its vendors. (Tr. p. 30).

14. Taxpayer does not maintain a showroom or sell out of a showroom. (Tr. p. 19).

15. The cabinetry that taxpayer designs and builds cannot be purchased off-the-floor at a lumberyard or other retail establishment. (Tr. p. 19).

**Conclusions of Law:**

The evidence on record in this case, consisting of the hearing transcript and exhibits, establishes that the taxpayer has failed to overcome the Department's *prima facie* case of tax liability under the assessment in question. Accordingly, by such failure, and under the reasoning set forth below, the determination by the Department that TAXPAYER owes the tax liability set forth in Notice of Tax Liability XXXXX must stand as a matter of law. In support thereof, the following conclusions are made:

Taxpayer is engaged in the business of manufacturing cabinetry which it sells to general building contractors. The Retailers' Occupation Tax is imposed on persons engaged in the business of selling tangible personal property at retail. (35 ILCS 120/2). The issue in this case is whether the taxpayer's sales during the audit period were sales at retail. The phrase "sale at retail" means a sale to a purchaser for final use or consumption. (35 ILCS 120/1). A sale of building materials to a builder has long been held to be a sale for use or consumption. Lyon & Sons Co. v. Department of Revenue, 23 ILL.2d 180 (1961). Therefore, since taxpayer sold cabinetry that it manufactured to building contractors who installed it for the building project owners, its sales during the audit periods were sales at retail subject to the Retailers' Occupation Tax.

Taxpayer, however, does not agree. (Tr. p. 7, 27, 28). Taxpayer's opinion is based, in part, on correspondence received from the Department which refers to the taxpayer as a construction contractor. (Taxpayer Ex. No. 2). The text of the letter when compared to the testimony of the taxpayer's witness regarding that letter (Tr. p. 27, 28) suggests that there was a misunderstanding or a

miscommunication between the taxpayer and the Department as to the nature of taxpayer's business. Therefore, Taxpayer Ex. No. 2 is not persuasive.

The controlling statutory provision is a paragraph inserted into the Retailers' Occupation Tax Act by amendment in 1961. (35 ILCS 120/1). That provision, in pertinent part, states,

"A person who . . . habitually engages in selling tangible personal property at retail is a person with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, if such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail."

The Department's regulations provide that a construction contractor incurs Retailers' Occupation Tax liability when it sells tangible personal property to a purchaser without installation. (86 Admin. Code chg. I. § 130.1940 (b)). Taxpayer's business during the audit period fits squarely within the language of the statute and the regulation. Taxpayer did not normally install the cabinetry it sold. That function was performed by the general contractor. The orders taxpayer received for the cabinetry it made were placed by general contractors and taxpayer was paid by the general contractor. The type of items taxpayer manufactured could not be purchased off-the-floor at lumber yards or similar establishments. The taxpayer manufactured cabinets and other types of cabinetry to the specifications set forth in architectural drawings. Although the cabinetry designed and manufactured by the taxpayer is custom made, there is nothing in the record to indicate that it served any purpose different from that served by cabinets and counters and other types of cabinetry that can be purchased off the floor at retail stores. The record indicates that the difference between off-the-floor cabinetry and that manufactured by the taxpayer was in size, design, color and, possibly, material, but not in function or purpose. Taxpayer's sales fall squarely within the definition of sales at

retail as set forth in the statute and the regulation. See Spurgeon v. Dept. of Revenue, 52 Ill.App.3d 29 (3rd Dist. 1977).

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's assessment be upheld in full.

Date

Charles E. McClellan  
Administrative Law Judge